State, to all the burdens of government, are yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

D. H. PINGREY.

Bloomington, Ill.

Court of Appeals of New York, Second Division.

MARCUS M. BEEMAN *v.* GEORGE A. BANTA.

Upon breach of warranty of the quality of an article sold to be used for a particular purpose, the measure of damage is the profits that might have been made by using the article for such purpose if it had been as warranted.

Appeal from the General Term of the Fourth Department of the Supreme Court.

S. M. Coon, for appellant.
Charles G. Baldwin, for respondent.

PARKER, J., February 25, 1890. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiff as that chickens could be kept therein in perfect condition. The jury have found the making of the warranty, its breach, and the amount of damages resulting therefrom. The General Term have affirmed these findings, and as there is some evidence to support each proposition, we have but to consider the exceptions taken. The appellant excepted to the charge of the Court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect, and make it conform to the warranty. And *Milk Pan Co.* v. *Remington* (1888), 109 N. Y. 143, is cited in support of such contention. That decision was not intended to, nor does it, modify the rule as recognized and enforced in *Passinger* v. *Thorburn* (1866), 34 N. Y. 634; *White* v. *Miller* (1877), 71 Id. 133; *Wakeman* v. *Wheeler & Wilson*

Manufacturing Co. (1886), 101 Id. 205; *Reed* v. *McConnell* (1886), Id. 276, and kindred cases. In that case the argument of the Court demonstrates—*First*, that improper evidence was received; and, *second*, that the finding of the referee was without evidence to support it. No other proposition was decided, and the discussion is not applicable to the facts before us.

The plaintiff was largely engaged in preparing poultry for market, which he had either raised or purchased. Before meeting the defendant, he had attempted to keep chickens for the early spring market in a freezer or cooler which he had constructed for the purpose. The attempt was unsuccessful, and resulted in a loss. The jury have found, in effect, that the defendant, with knowledge of this intention of the plaintiff to at once make use of it in the freezing and preservation of chickens for the May market following, expressly represented and warranted that for about five hundred dollars he would construct a freezer which should keep them in perfect condition for such market; that he failed to keep his contract in such respect, resulting in a loss to the plaintiff of many hundred pounds of chickens. The Court charged the jury that, if they should find for the plaintiff, he was entitled to recover as one of the elements of damage the difference between the value of the refrigerator as constructed, and its value as it would have been if made according to contract. The correctness of this instruction does not admit of questioning. Had the defendant made no use of the freezer, such rule would have embraced all the damages recoverable. But he did make use of it, and such use as was contemplated by the contract of the parties. The result was the total loss of hundreds of pounds of chickens. The fact that the defendant well knew the use to which the freezer was to be immediately put, and his representation and warranty that it would keep chickens in perfect condition, burden him with the damage sustained because of his failure to make good the warranty. Upon that question the Court instructed the jury that the plaintiff was entitled to recover

the value of the chickens, less cost of getting them to market, including freight and fees of commission merchant. The question of value was left to the jury, but they were permitted to consider the evidence tending to show that frozen chickens were worth forty cents a pound in the market during the month of May. Such instruction we consider authorized. The object of the freezer was to preserve chickens for the May market. The expense of construction and trouble, as well as expense of operation, was incurred and undertaken in order to secure the enhanced prices of the month of May. It was the extra profit which the plaintiff was contracting to secure, and, in so far as the profits contemplated by the parties can be proven, they may be considered. Gains prevented, as well as losses sustained, are proper elements of damage: *Wakeman* v. *Wheeler & Wilson Manufacturing Co.* (1886), 101 N. Y. 205.

We have carefully examined the other exceptions to the charge as made, and to the refusals to charge as requested, and also the exceptions taken to the admissibility of testimony, but find no error justifying a reversal. The insistence of the appellant that the judgment be reversed, because against the weight of evidence, may have been entitled to some consideration by the General Term, but it cannot be regarded here.

The judgment should be affirmed. All concur, except FOLLETT, C. J., and VANN, J., not sitting.

The underlying principle which governs the measure of damages in all cases is, that the person injured shall receive a compensation commensurate with his loss. In actions *ex contractu*, the rule is, that such damages are recoverable as the parties contemplated would be likely to result from a breach when the contract was made. In actions *ex delicto*, the wrong doer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and the general experience of mankind, were likely to ensue, and which, therefore, he may reasonably be supposed to have foreseen when the act was committed: 1 Suth. Dam. ch. 3, § 4.

In both kinds of action, the right to recover for loss of anticipated profits, is sometimes affirmed, and sometimes denied, and the adjudications, on this subject, are far from harmonious. There is nothing, however, in either of the above rules, which necessarily excludes

loss of profits as an element of damage, though Mr. Parsons, in his work on contracts, lays down the general doctrine that: "Both in England and America, it is generally held that profits are not to be included in the injury for which compensation is to be made, not because they are in themselves remote, but because they depend wholly upon contingencies:" 3 Pars. Contract *181.

But in many of the cases, where profits were excluded as an element of damages, the ruling was based upon the fact that the profits in question were, in that particular case, remote. It would seem to follow that when loss of profits is not a remote consequence of the cause of action, and when the profits can be ascertained with reasonable certainty, and do not depend wholly upon contingencies, then they may be included in recoverable damages. And it is not necessary that the amount of the anticipated profits should be capable of exact measurement, for where it is certain that the loss of profits has been caused by the defendant's act, and the only uncertainty is, as to their amount, such profits may form the measure of damages: *Griffin* v. *Colver* (1857), 16 N. Y. 490; *Wakeman* v. *Wheeler & Wilson Mfg. Co.* (1886), 101 N. Y. 205.

In actions for breach of a contract, which had it been kept, would have yielded the plaintiff a profit, the loss of such profit, is the direct consequence of the breach, and such profit constitutes the measure of damages.

It was this class of cases that Justice CURTIS referred to in *The Philadelphia, W. and B. R. R. Co.* v. *Howard* (1851), 13 How. (54 U. S,) 307, where he says: "Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost."

The leading case on this subject, which is cited in nearly all the subsequent decisions, is *Masterton* v. *The Mayor* (1845), 7 Hill (N.Y.) 61. That was a case where a municipal corporation, which had contracted to buy from plaintiff a certain quantity of marble, to be quarried and prepared by him, refused to carry out its contract. The marble in question, not being in general use, had no market value. It was held, that the measure of damages was the profit that the plaintiff would have made out of the transaction, to be estimated by subtracting the cost of quarrying and preparing the marble from the price which the city had contracted to pay for it.

United States v. *Speed* (1868); 8 Wall. (75 U. S.) 77 was a case where the War Department had entered into a contract with Speed, to furnish him with fifty thousand hogs to be slaughtered for the government at a stipulated price, and only a small number of hogs were furnished. The Supreme Court held, that the profit Speed would have made out of his contract, was the measure of damages.

Upon breach, by the vendee, of a contract to purchase logs at a fixed price, the damages are the profit that would have been made by the vendor from fulfilling the contract: *Cunningham* v. *Dorsey* (1856), 6 Cal. 19; that is, the difference between the cost of procuring,

preparing and delivering the logs and the contract price for them: *Cameron* v. *Hughes* (1889), 74 Wis. 425.

Where a manufacturer has agreed to deliver certain goods, at a stipulated price, and the vendee has contracted to resell the same at an advance, the measure of damages, on failure to deliver, is the profit the vendee would have made from his resale: *Van Arsdale* v. *Rundel* (1876), 82 Ill 63.

In an action against a railroad company, for refusal to allow the plaintiff to do certain pile driving for the company according to contract, the damage allowed was the difference between the cost to plaintiff and the contract price of doing the work: *The Cincinnati, Indianapolis, St. Louis and Chicago Ry. Co.* v. *Lutes* (1887), 112 Ind. 276.

In *Boorman* v. *Nash* (1829), 9 B. and C. 145, the defendant had refused to receive oil which he had contracted to purchase, and the Court fixed the plaintiff's damages at the difference between the contract and the market price of the oil, in other words, the profit that he would have made out of the transaction.

In a case where a railroad company broke a contract whereby it had agreed to store all the grain it carried through a certain place with the plaintiff, the plaintiff could recover as damages the profit he would have made from storing such grain: *Richmond et al.* v. *The Dubuque and Sioux City R. R. Co. et al.* (1871), 33 Iowa 422.

Where the tort or breach of contract sued for, has caused an interruption of an established business, the profits which would have been made out of the business, had no interruption occurred, constitute the measure of damages. The loss of profits is, in this class of cases, the direct consequence of the dedendant's act, and since the business is already established, the rate of profit which has been made in the past may fitly be taken as the measure of damages which might reasonably have been anticipated for the future. But where the business is not established, and the defendant's act or omission merely prevented the plaintiff from starting it, the anticipated profits of such proposed business have usually though not invariably, been excluded in the computation of damages.

Thus, in an action for breach of a contract not to foreclose for a certain time a mortgage upon a farm which the plaintiff used in his business as a dairyman and which he was so using when the contract was made, evidence as to the value of the use of the farm in plaintiff's business was held admissible: *Manning* v. *Fitch* (1884), 138 Mass. 273; and in an action by a partner against his copartner for dissolving the partnership before the time agreed on, the plaintiff's share of the anticipated profits during the remainder of the term were allowed as damages: *Bagley* v. *Smith* (1853), 10 N. Y. 489.

Where the plaintiff is obliged, on account of defendant's trespass, to move away from a store in which he has established a profitable business, the falling off in his profits after removal, form the measure of damages: *Allison* v. *Chandler* (1863), 11 Mich. 542; *Chapman* v. *Kirby* (1868), 49 Ill. 211; *Schile* v. *Brokhahus* (1880), 80 N. Y. 614.

But in a case in Illinois, a business, that had only been running for a month was not sufficiently

established, to justify the application of this rule: *Illinois and St. Louis R. R. and Coal Co.* v. *Decker* (1878), 3 Brad. (Ill.) 135. Such loss of profits is also the measure of damages, where the plaintiff's business has been interfered with by the wrongful refusal of the dedefendant to furnish him with gas: *Shepard* v. *Milwaukee Gas Light Co.* (1862), 15 Wis. 318; or steam power: *Chapman* v. *Kirby* (1868), 49 Ill. 211; or water: *Holden* v. *Lake Co.* (1873), 53 N. H. 552; or to make repairs according to contract: *Stewart* v. *Lanier House* Co. (1885), 75 Ga. 582.

In an action by the owner of a saw mill for failure to deliver logs, the lack of which caused the mill to be idle, profits that would have been earned had the mill run are recoverable: *Leonard* v. *Beaudry* (1888), 68 Mich. 312; but where the mill did not stop, the profits anticipated from sawing the logs which were not delivered, are not recoverable: *Petrie* v. *Lane* (1887), 67 Mich. 454. Where the owners of a rolling mill contracted for the purchase of a certain amount of iron, of a quality not procurable elsewhere, and the vendor failed to deliver according to contract, it was held, that the measure of damages was the loss the vendees sustained, in their business, by being obliged to use an inferior quality of iron in their manufactures: *McHose* v. *Fulmer* (1873), 73 Pa. 365.

Where the lessor of premises intended to be used for business purposes, refuses to yield possession, the American authorities hold that the expected profits of the business are not recoverable: *Giles* v. *O'Toole* (1848), 4 Barb. (N. Y.) 261; *Green* v. *Williams* (1867), 45 Ill. 206; *Kenny* v. *Collier* (1887), 79 Ga. 743; though the contrary doctrine has been announced in England; *Jacques* v. *Millar* (1877), L. R., 6 Ch. Div. 153; but where the premises are leased for the purpose of carrying on a business which the lessee has already established in another store in the vicinity which he has given up in reliance on his lease, profits lost from the lessor's refusal to yield possession are recoverable: *Poposkey* v. *Munkwitz* (1887), 68 Wis, 322.

Whether profits anticipated from the enjoyment of a leased farm are recoverable in an action against the landlord for refusing to yield possession is a disputed question. The right to recover such profits is affirmed in *Taylor* v. *Bradley* (1868), 39 N. Y. 129; and *Wolf* v. *Studebaker* (1870), 65 Pa. 459; and denied in *Rhodes* v. *Baird* (1866), 16 Ohio St., 573; *Cilley* v. *Hawkins* (1868), 48 Ill. 308; and *Robrecht* v. *Marling* (1887), 29 W. Va. 765.

Anticipated profits are not recoverable in America in an action for breach of contract in not completing machinery in time; *McBoyle* v. *Reeder* (1841), 22 N. C. 607; *Freeman* v. *Clute* (1848), 3 Barb. (N. Y.) 424; *Benton* v. *Fay* (1872), 64 Ill. 417; or a vessel, *Taylor* v. *Maguire* (1848), 12 Mo. 313; or a railroad, *Hunt* v. *Oregon Pac. Ry. Co.* (1888), U. S. C. Ct., D. Ore., 36 Fed. Repr. 481; though the English case of *Fletcher* v. *Tayleur* (1856), 17 C. B. 21 is opposed to this doctrine, and in a very recent case in Massachusetts, it was held that in an action by a vendee for breach of contract for the sale of goods which were purchased for the purpose of starting a business, loss of profits of the business was a proper element of damages. *Abbott and others* v.

Hapgood and another (1889), 150 Mass. 248.

In an action against the master of a whaling ship, for breaking up a voyage, the anticipated profits of the voyage are not recoverable: *Brown* v. *Smith* (1853), 12 Cush. (Mass.) 366.

A carrier, who by delay in transporting goods, causes a loss of profit to the owner, is not responsible therefor if he had no notice of the special reasons making delays dangerous: *Hadley* v. *Baxendale* (1854), 26 Eng. L. and Eq. 398; but if he had such notice, he is responsible for the loss of profit, as where he knew that the goods had been advantageously sold on condition of their reaching their destination at a certain time: *St. Louis, I. M. and S. Ry. Co.* v. *Mudford* (1886), 48 Ark. 502. Where a manufacturer delivered his goods to a railroad company to be carried to a place where an agricultural show was to be held at which he intended to exhibit them, and the goods arrived too late for the show, it was held that loss of profit from the exhibition was to be considered in estimating damages: *Simpson v. The London and Northwestern Railway Co.* (1876), L. R. 1. Q. B. Div. 274. But where a railroad company negligently delayed delivery of cloth intended to be made into caps, until the end of the season, it was not liable for the loss of profits that might have been made on the caps: *Wilson* v. *The Lancashire and Yorkshire Ry. Co.* (1861), 9 C. B. (N. S.) 632.

Where negligent delay in delivering or failure to deliver a telegram, causes loss of profits to the sender, he may recover the amount of such profits from the telegraph company. Thus where a message, directing the purchase of stocks or grain, is not delivered until the prices have risen, compelling the sender to pay more for his stock than he need have done, had there been no delay, he may recover for his loss of a profitable, bargain: *The United States Telegraph Co.* v. Wenger (1867), 55 Pa. 262; *Rittenhouse and others* v. *The Independent Line of Telegraph* (1870), 44 N. Y. 263; *True and another* v. *International Telegraph Co.* (1872), 60 Me. 9. And the same rule has been applied where the telegram was an acceptance of goods at a certain figure, and the sender was afterwards obliged to pay more for them: *Squire and others* v. *Western Union Telegraph Co.* (1867), 97 Mass. 232; and where it was a direction to buy land, which, in consequence of the delay, was sold to another person, and afterwards rose in value: *Alexander et al.* v. *Western Union Telegraph Co.* (1888), 66 Miss. 161; and where such telegram was an order to sell goods, which afterwards fell in value: *Daugherty* v. *American Union Telegraph Co.* (1883) 75 Ala. 168; *Thompson and another* v. *The Western Union Telegraph Co.* (1885), 64 Wis. 531. But a telegraph company is not liable for gains expected to be realized from trotting a race horse at a fair: *The Western Union Telegraph Co.* v. *Crall* (1888), 30 Kan. 580. And where the delay, in delivering the message, merely causes the party not to buy certain property of a fluctuating value, on which he might, or might not, have made a profit, according to the time when he should have sold it, and he does not in fact buy it at all, the anticipated profits of the transaction are too contingent to be recovered:

Western Union Telegraph Co. v. *Hall* (1888), 124 U. S. 444; *Cannon and others, trading as Cannon, Fetzer & Wadsworth*, v. *Western Union Telegraph Co.* (1888), 100 N. C. 300. Where delay in delivering a telegram caused an undertaker to lose an order, the Court refused to allow him his anticipated profit thereon: *Clay* v. *The Western Union Telegraph Co.* (1888), 81 Ga. 285; though in cases almost similar, the recovery of such profit was allowed to a broker: *The Western Union Telegraph Co.* v. *Fatman* (1884), 73 Ga. 285; and to a doctor: *Western Union Tele graph Co.* v. *Longwill*, decided in the Supreme Court of New Mexico March 21, 1889.

In actions for the wrongful discharge of the plaintiff from an occupation in which his compensation was measured by the profits of the business, the authorities are conflicting. Thus the master of a whaling ship who was to have a certain share in the proceeds of the voyage, and an additional compensation depending upon the amount of the cargo, may recover his share of the profits both before and after his wrongful discharge: *Dennis* v. *Maxfield* (1865), 10 Allen (Mass.) 138; and in an action for breach of a contract to employ the plaintiff to work a farm on shares, the measure of damages was the profit the plaintiff would have made had the contract been fulfilled: *Hoy v. Gronoble* (1859), 34 Pa. 9; and where manufacturers of sewing machines agreed that if an agent would sell a certain number of their machines to any one firm, he should have the sole agency for their machines at that place, the agent was entitled, on breach of such agreement, to recover the probable profits of such sole agency; *Wakeman* v. *Wheeler & Wilson Mfg. Co.* (1886), 101 N. Y. 205. But in two cases, where the facts were almost identical with those in *Wakeman* v. *Wheeler and Wilson Mfg. Co.*, *supra*, the recovery of probable profits was not allowed: *Howe Mach. Co.* v. *Bryson* (1876), 44 Iowa 159; *Taylor Mfg. Co.* v. *Hatcher Mfg. Co.* (1889), U. S. C. Ct., S. D., Ga. 39 Fed. Repr. 440. And the anticipated profits of a salesman, who sells on commission, are too uncertain to be recovered: *Union Refining Co.* v. *Barton* (1884), 77 Ala. 148; *Stern* v. *Rosenheim* (1887), 67 Md. 503, except as to future sales for which he had made definite contracts: *Beck* v. *West* (1888), 87 Ala. 213.

Where a life insurance agent, who received as compensation a share of the premiums on policies secured by him, was wrongfully discharged, it was held that while an estimate of his probable future earnings, as computed from the number of policies theretofore obtained by him, was too uncertain to be considered in estimating damages, yet that his loss of profits was the measure of damages, and the probable value of the renewals of the policies he had obtained, being ascertainable by calculation, was competent proof of such loss: *Lewis* v. *Ins. Co.* (1876), 61 Mo. 534.

On breach of warranty that seed sold was of a particular kind, the damages allowed were the difference in value between the crop raised from the seed sold and the crop that could have been raised from the seed if it had been as warranted: *Passinger* v. *Thorburn* (1866), 34 N. Y. 634; *Wolcott* v.

Mount (1873), 36 N. J. Law 262; *White* v. *Miller* (1877), 71 N. Y. 118.

It will thus be seen that while a majority of the authorities sustain the doctrine laid down in the principal case, yet the decisions on the subject are by no means harmonious. LOUIS BOISOT, JR.

Chicago, Ill.

[The question of the right to recover profits as and by way of damages, has also arisen in the case of a real estate broker engaged to procure a purchaser, where his commission was to be such sum as he could procure over and above a stated sum, fixed by the owner as the price of the property, and the vendor has, before the time stipulated by the agreement, sold the property himself. Thus in *Fairchild* v. *Rogers* (1884), 32 Minn. 269, an action for damages for breach of contract, the defendant, for a valuable consideration, had agreed with the plaintiff that the latter should have the exclusive right, for sixty days, to sell real estate belonging to the defendant, the plaintiff to retain all he received over a given sum. The breach alleged was a sale by the defendant within the time, the amount claimed being the excess over the sum named as the price to be accepted. The contract was a verbal one, and the Court below found for the defendant. The Court, in ordering a new trial, said: "The recovery sought can only be opposed upon the ground that the *fact* of a loss of profit, and the *amount* of it, were not proved; that it did not appear that the plaintiff would have sold the land if his authority had not been terminated by the defendant, nor for how much he would have sold it. * * * The general rule that the loss of profits affords no basis for the awarding of damages for breach of contract, in cases where the profits were to have accrued from some engagement or contract independent of and collateral to the principal contract, for the breach of which the action is brought; that is to say, in cases where the contemplated profits do not arise naturally,—that is, in the usual conrse of things,—from the breach itself; or are not such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. But the reason which governs such cases has no application in a case like that under consideration, where the anticipated profit was to have been realized directly from the contract which these parties are alleged to have made. By the very terms of the contract, the plaintiff, by the performance of it, was to realize the very profit which he claims to have lost by the breach complained of, and for which he now seeks to recover damages. There is no legal reason for denying the right to recover such profits as the parties contemplated as the direct result of the contract. But one seeking a recovery must show by proof both his right to recover, and the measure or extent of the loss or injury for which he demands compensation. * * * It is not necessary, however, that the evidence should show this to an absolute certainty. Proof establishing the facts, in the estimation of the jury, to a reasonable degree of certainty, would be sufficient. * * In this case the result depended upon facts which were not susceptible of certain, absolute proof; such as the profit which might have accrued from an established mercantile business."

 E. W.